No. 03-879

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMISSIONER OF REVENUE FOR THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

H.J. WILSON COMPANY, INC.,

Respondent.

On Petition for Writ Of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly held, consistent with the Constitutional structure as described in the Federalist Papers, that Congress abrogated state sovereign immunity under the Bankruptcy Clause of Article I.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Respondent H.J. Wilson Company, Inc. is a wholly owned subsidiary of Service Merchandise Corporation.

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Respondent H.J. Wilson Company, Inc. ("H.J. Wilson") respectfully requests a denial of writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 333 F.3d 666 (6th Cir. 2003). The opinion of the United States District Court is reported at 265 B.R. 917 (M.D. Tenn. 2001). The opinion of the United States Bankruptcy Court is reported at 262 B.R. 738 (Bankr. M.D. Tenn. 2001).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 24, 2003, and entered its order denying the Commissioner of Revenue for the Commonwealth of Massachusetts' (the "Commissioner") petition for rehearing en banc and petition for rehearing on September 12, 2003. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Bankruptcy Clause of the United States Constitution provides that Congress has the power "[t]o establish an uniform Rule of Naturalization, and uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The Eleventh Amendment to the United States Constitution provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State. U.S. Const. amend. XI.

The United States Bankruptcy Code provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section[] . . . 505. . . of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such section[] to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> . . .
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 106(a) (1), (2), (3), (b).

STATEMENT OF THE CASE

H.J. Wilson, a Louisiana corporation, is a wholly-owned subsidiary of Service Merchandise Company, Inc. ("Service Merchandise"). As part of its corporate structure, Service Merchandise centrally performs many functions on behalf of H.J. Wilson and its other subsidiaries, including but not limited to, payroll, advertising and payment of periodic expenses such as rent, supplies, accounting and general miscellaneous expenses and borrowing (collectively, the "Central Function Expenses"). In connection therewith, Service Merchandise allocates to H.J. Wilson and its other subsidiaries a portion of the Central Function Expenses based upon, among other things, each subsidiary's percentage of annual sales to total sales.

H.J. Wilson timely filed Foreign Business or Manufacturing Corporate Excise Returns on Forms 355B with the Commissioner for each of its 1987, 1988, 1989, 1990, 1991 and 1992 tax years (the "Tax Returns"). In each of the Tax Returns, H.J. Wilson listed deductions for the amounts of Central Function Expenses paid by Service Merchandise but allocated to H.J. Wilson.

Subsequent to filing the Tax Returns, the Commissioner assessed corporate excise taxes, interest and penalties against H.J. Wilson for tax years 1987 through 1992 (the "Assessments"). The Commissioner disallowed the deduction of a certain portion of the Central Function Expenses by H.J. Wilson, which, in turn, increased H.J. Wilson's tax liability for years 1987 through 1992. After paying the full amount of the Assessments, H.J. Wilson timely requested an abatement of the taxes assessed. The Commissioner has denied this request.

On March 27, 1999, Service Merchandise and H.J. Wilson Company, Inc. each filed voluntary petitions in the United States Bankruptcy Court for the Middle District of

Tennessee for reorganization relief under chapter 11 of the Bankruptcy Code.

On August 7, 2000, H.J. Wilson commenced an adversary proceeding by filing a complaint (the "Complaint") against the Commissioner.[1] H.J. Wilson sough a determination under 11 U.S.C. § 505 that it does not owe certain corporate excise taxes assessed against it by the Commissioner. In addition, H.J. Wilson requested a refund of tax overpayments made by H.J. Wilson to the Commissioner.

On September 13, 2000, the Commissioner filed amended Proofs of Claim Numbers 4845 and 4846, which superseded Proof of Claim Number 375, filed in May of 1999. The amended Proofs of Claim replaced the Commissioner's prior Proofs of Claim, which had asserted a priority claim of $1.7 million and a general unsecured claim of nearly $300,000 for unpaid sales and corporate excise taxes from 1996 through 1998. Instead, Proofs of Claim 4845 and 4846 included claims for sales taxes from the fourth quarter of 1996 through the first quarter of 1999 in the amount of $344,484.

The Commissioner filed a Motion to Dismiss on October 16, 2000, seeking dismissal of the Complaint on the grounds that the Court did not have jurisdiction to hear the case under the Eleventh Amendment to the Constitution and principles of sovereign immunity. Thereafter, on November 15, 2000, the Commissioner filed the Core Proceeding Motion and the Abstention Motion. These motions asserted additional grounds to support the Commissioner's request that the Bankruptcy Court not hear the causes of action.

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[1] As of the filing of the Complaint, the Assessments were still on appeal before the Massachusetts Appellate Tax Board.

On February 9, 2001, the Bankruptcy Court issued an Order Denying (1) Defendant's Motion to Dismiss, (2) Motion of Defendant for Determination that this Adversary Proceeding is Not a Core Proceeding, and (3) Motion of Defendant for Mandatory Abstention or, in the Alternative, for Discretionary Abstention (the "Order"). In the Order, United States Bankruptcy Court Judge George C. Paine II held: (1) that it was appropriate for the Bankruptcy Court to maintain jurisdiction over the adversary proceeding under Section 505 of the Bankruptcy Code; (2) that sovereign immunity did not apply in this case; and (3) that the Bankruptcy Court should not abstain from hearing and determining the issues in the adversary proceeding. The Court found that each state surrendered its sovereign immunity on matters of bankruptcy at the time it joined the Union upon equal footing with the other states. Judge Paine explained that "[t]here is no immunity to be claimed in the context of bankruptcies under the Eleventh Amendment and, hence, no issue whether such immunity can or must be waived or abrogated for a suit against a state to proceed."

The Commissioner appealed the Bankruptcy Court's Order to the United States District Court for the Middle District of Tennessee, and District Court Judge Todd J. Campbell issued a Memorandum Opinion on June 15, 2001. The District Court reversed the ruling of the Bankruptcy Court, and determined that the Bankruptcy Court did not have jurisdiction over the Commissioner. Judge Campbell held that the Commissioner is entitled to sovereign immunity from the adversary proceeding, and that the Commissioner did not waive its sovereign immunity when it filed Proofs of Claim against H.J. Wilson.

H.J. Wilson timely appealed to the United States Court of Appeals for the Sixth Circuit, seeking a reversal of the District Court's decision, a reinstatement of the decision of the Bankruptcy Court, and a finding that the Bankruptcy Court does retain jurisdiction over the Commissioner. On June 24, 2003,

the Sixth Circuit reversed the District Court decision, and ruled that the Eleventh Amendment did not bar H.J. Wilson's adversary complaint. Following its decision in *In re Hood*, 319 F.3d 755 (6th Cir. 2003), the Sixth Circuit held that no sovereign immunity exists as to bankruptcy matters. The Sixth Circuit stated that in light of this determination, it did not need to address the issue of waiver of sovereign immunity due to the Commissioner's filing of proofs of claim. The Sixth Circuit remanded the case to the District Court for consideration of the abstention issues.

On September 12, 2003, the Sixth Circuit denied the Commissioner's petition for rehearing en banc and petition for rehearing. The Commissioner filed a timely motion to stay the mandate, which has not been acted on. The Sixth Circuit has not issued its mandate.

ARGUMENT

I. THIS CASE SHOULD NOT BE HELD PENDING RESOLUTION OF *IN RE HOOD*

A. *In re Hood* is Factually Distinguishable, and Should Not Prevent Resolution of this Case

The Commissioner argues that this case should be held until the resolution of *In re Hood*, which is currently pending before this Court. However, *In re Hood* is not necessarily dispositive of this case. For example, unlike *In re Hood*, H.J. Wilson has argued from the beginning of this litigation that the Commissioner waived any sovereign immunity rights when it filed proofs of claim in H.J. Wilson's bankruptcy case. That argument has not been ruled on by the Sixth Circuit, which refused to address the issue in light of its determination that sovereign immunity was not available in this case.

In *In re Hood*, on the other hand, the Sixth Circuit found that debtor "Hood waived this argument by failing to raise it before the Bankruptcy Court, the Bankruptcy Appellate Panel, or in her briefs before this court." *In re Hood*, 319 F.3d 755, 760 (6th Cir. 2003). Thus, regardless of the outcome of *In re Hood*, which is currently pending before this Court, the Commissioner has waived its right to sovereign immunity by filing proofs of claim in H.J. Wilson's Chapter 11 case.

B. The Creditors of the Service Merchandise Estate Deserve to Finally Receive the Funds Owed them by the Commissioner of Revenue

The Commissioner has been fighting the reimbursement of H.J. Wilson's tax overpayment since 1991. The Commissioner has lost in the Bankruptcy Court, and has lost again in the Sixth Circuit. H.J. Wilson and the related Service Merchandise

entities are currently in liquidation, and the creditors of the Service Merchandise estate should be paid the amounts due and owing to them from the Commissioner.

Holding the Commissioner's Petition for Certiorari pending the resolution of *In re Hood* serves no purpose other than to further delay the Commissioner's payment of money it has owed to H.J. Wilson for nearly thirteen years.

CONCLUSION

For the reasons set forth above, H.J. Wilson respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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